Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–23–93 OF 1999(2)
KAMALANATHAN RATNAM J
2 NOVEMBER 2000

Civil Procedure *— Preliminary objection — Whether court should rule on preliminary issues — Whether plaintiff's action premised on three different causes of action — Whether issues needed to be clarified by evidence at full trial — Rules of the High Court 1980 O 33 r 2*

The plaintiff filed an application pursuant to O 33 r 2 of the Rules of the High Court ('RHC') that the following question be determined as a preliminary issue before the trial of the action: 'Whether the Resolution dated 12 October 1999 and the proposed Extraordinary General Meeting of the Malaysian Bar on 20 November 1999 were ultra vires the powers and objects of the Malaysian Bar under the Legal Profession Act 1976 ('the LPA')'. The defendants averred that since the plaintiff's action against the defendants was premised on three different causes of action, ie that the resolution and the proposed EGM were: (a) ultra vires the LPA; and/or (b) constitute contempt of court; and/or (c) constitute offences under the Sedition Act 1948 and since the plaintiff's application was only to try one of the three different causes of action, unless the plaintiff was prepared to abandon the other two causes of action, the plaintiff could not contend that the determination of the proposed issue would dispose of the plaintiff's case without the necessity of a trial. The defendants also contended that whether the matter was ultra vires or not was a matter of evidence which ought to be determined at the full trail of this action and also for the court to know the reasons behind the resolution of the EGM.

Held:

(1) Having considered the affidavit of the defendants, the court found that the defendants had failed to see the difference between the cause of action and the grounds on which the cause of action was founded. The cause of action was that the notice of the EGM with the resolution and the proposed meeting, were all ultra vires the powers and objects of the Malaysian Bar under the LPA on the grounds that it was contemptuous, seditious and unsconstitutional (see p 477G–I).

(2) It is a requirement of the law for the defendants to satisfy the court in the affidavit itself, with evidence, instead of saying that they would adduce such evidence at trial, more so when the plaintiff had put in this application for leave to decide the issue on affidavit evidence. In any case, the court had ruled that if parties see the need to, they can adduce oral evidence. Therefore the court could

not accept the defendants' complaint that making this order would deprive them of the right to adduce oral evidence (see p 478C–D).

(3) The plaintiff was perfectly right to move the court under O 33 r 2 of the RHC. The issues and the grounds to back up the application are matters of law and if the defendants contend that they need to call witnesses, the court had made an order allowing them to do so. After all since notice to cross-examine on the affidavit can be served to allow for oral evidence to be admitted, there was nothing wrong in allowing the defendants the right to call any witness in support, instead of filing an affidavit (see p 478F–G).

(4) Where the court is of the view that the issues could be decided without the need for a prolonged trial, the court ought to move under O 33 r 2 to be read with r 5 of the RHC. In respect of the defendants' submission, the court held that where contempt and sedition were concerned, intention or motive was irrelevant and immaterial. Therefore the defendants' argument that evidence must be led to show intention and the motive for calling the EGM and moving the resolution, was no longer meritorious (see p 479A–B).

[**Bahasa Malaysia summary**

Plaintif telah memfailkan satu permohonan menurut A 33 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') agar soalan berikut diputuskan sebagai isu permulaan sebelum pembicaraan tindakan bermula: 'Sama ada Resolusi bertarikh 12 Oktober 1999 dan Mesyuarat Agung Luar Biasa Majlis Peguam Malaysia ('MALB') yang dicadangkan pada 20 November 1999 adalah ultra vires kuasa dan objek Majlis Peguam Malaysia di bawah Akta Profesion Undang-Undang 1976 ('APU')'. Defendan-defendan berhujah bahawa oleh kerana tindakan plaintif terhadap defendan-defendan adalah berlandaskan tiga kausa tindakan yang berbeza, iaitu bahawa resolusi dan MALB yang dicadangkan: (a) adalah ultra vires APU; dan/atau (b) merupakan penghinaan mahkamah; dan/atau (c) merupakan kesalahan-kesalahan di bawah Akta Hasutan 1948 dan oleh kerana permohonan plaintif hanyalah untuk membicarakan satu daripada tiga kausa tindakan itu, melainkan plaintif bersedia meninggalkan dua kausa tindakan yang lain, plaintif tidak boleh berhujah bahawa keputusan isu yang dicadangkan akan menyelesaikan kes plaintif tanpa keperluan untuk mengadakan satu perbicaraan. Defendan-defendan juga berhujah bahawa sama ada hal tersebut adalah ultra vires atau tidak merupakan suatu perkara berkenaan keterangan yang harus diputuskan di perbicaraan penuh tindakan ini dan juga supaya mahkamah dapat mengetahui alasan untuk resolusi MALB.

Diputuskan:

(1) Setelah menimbang afidavit defendan-defendan, mahkamah mendapati bahawa defendan-defendan telah gagal melihat perbezaan di antara kausa tindakan dan alasan-alasan atas mana kausa tindakan didasarkan. Kausa tindakan adalah bahawa notis MALB dengan resolusi dan mesyuarat yang dicadangkan kesemuanya ultra vires kuasa dan objek Majlis Peguam Malaysia di bawah APU berasaskan alasan-alasan ia bersifat menghina, menghasut dan di luar perlembagaan (lihat ms 477G–I).

(2) Adalah satu keperluan undang-undang untuk defendan-defendan memuaskan mahkamah dalam afidavit itu sendiri, dengan keterangan, dan bukannya untuk mengatakan bahawa mereka akan mengemukakan keterangan demikian di perbicaraan, apatah lagi apabila plaintif telah mengemukakan permohonan ini untuk kebenaran memutuskan isu atas keterangan afidavit. Walau bagaimanapun, mahkamah telah memutuskan bahawa sekiranya pihak-pihak fikirkan ia perlu, mereka boleh mengemukakan keterangan lisan. Maka mahkamah tidak boleh menerima aduan defendan-defendan bahawa perintah ini akan melucuthak mereka untuk mengemukakan keterangan lisan (lihat ms 478C–D).

(3) Plaintif memang betul dalam memohon tindakan mahkamah di bawah A 33 k 2 KMT. Isu-isu dan alasan-alasan untuk menyokong permohonan adalah perkara yang berkaitan dengan undang-undang dan andainya defendan-defendan berhujah bahawa mereka perlu memanggil saksi-saksi, mahkamah telah membuat satu perintah yang membenarkan mereka untuk berbuat demikian. Lagipun, oleh kerana notis untuk memeriksa balas atas afidavit boleh disampaikan bagi membolehkan keterangan lisan dimasukkan, tiada kesalahan dalam memberikan defendan-defendan hak untuk memanggil mana-mana saksi untuk menyokong, sebagai ganti memfailkan afidavit (lihat ms 478F–G).

(4) Di mana mahkamah berpandangan bahawa isu-isu boleh diputuskan tanpa keperluan untuk mengadakan perbicaraan yang dilanjutkan, mahkamah haruslah bertindak di bawah A 33 k 2 dibaca bersama k 5 KMT. Berhubung dengan penghujahan defendan-defendan, mahkamah memutuskan bahawa sejauh mana penghinaan dan hasutan adalah berkenaan, hasrat atau motif adalah tidak relevan dan tidak penting. Maka hujah defendan-defendan bahawa keterangan mesti dikemukakan untuk menunjukkan hasrat dan motif untuk memanggil MALB dan meluluskan resolusi tersebut tidak lagi dihargai (lihat ms 479A–B).]

Notes

For cases on preliminary objection, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3819–3828.

Cases referred to

Chan Kum Loong v Hii Sui Eng [1980] 1 MLJ 313 (refd)
Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors [2000] 1 MLJ 1 (refd)

Legislation referred to

Rules of the High Court 1980 O 33 rr 2, 5, O 34
Sedition Act 1948

DP Vijandran (*Raja Segaran & Assoc*) for the plaintiff.
Robert Lazar (*Shearn Delamore & Co*) for the first and third defendants.
Malik Imtiaz Ahmed bin Ghulam Sarwar (*Malik Imtiaz Sarwar*) for the second defendant.

Kamalanathan Ratnam J

Facts

The facts leading to the filing of this case have been narrated fully in my earlier judgment which dealt with the plaintiff's application for an interim injunction to restrain the defendants from holding an EGM to discuss issues relating to the judiciary (see [2000] 1 MLJ 1). The defendants' application to strike out the writ was also similarly dismissed. The defendants appealed to the Court of Appeal against both my decisions. I had fixed this case for case management on 29 December 1999 when I directed the plaintiff to comply with O 34 of the Rules of the High Court 1980 ('the RHC'). On 17 January 2000 when the case next came up for case management, parties informed me that they had not been able to comply with my earlier directions but agreed to do so together with the filing of the affidavits verifying list of documents by 10 February 2000, being the next case management date. On 10 February 2000, since parties had complied with the earlier directions I then directed parties with regard to the filing of the common agreed bundle of documents. I then fixed the trial of this case to commence from 29 May 2000 to completion. Since the defendants had in the meantime filed an appeal to the Court of Appeal against my decision granting the plaintiff the interim injunction, I vacated the hearing date fixed for 29 May 2000. The Court of Appeal then on 12 July 2000 orally dismissed the defendants' appeal against both my decisions. The written judgment of the Court of Appeal was then not as yet available.

The application (encl 61)

The plaintiff then filed an application on 26 July 2000 pursuant to O 33 r 2 of the RHC which allowed the court to order any question or issue arising in a cause or matter, whether of fact or law, or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter and which also permitted the court to give directions as to the manner in which the question or issue was to be

stated. The plaintiff's application was that I ought to determine as a preliminary issue before the trial of the action, the following question:

> Whether the Resolution dated 12 October 1999 and the proposed Extraordinary General Meeting of the Malaysian Bar on 20 November 1999 were ultra vires the powers and objects of the Malaysian Bar under the Legal Profession Act 1976 (the LPA)?

The grounds for the said application as stated by the plaintiff were as follows:

(a) The Resolution and Extraordinary General Meeting are not within the powers and/or objects of the Malaysian Bar under the LPA.

(b) The Resolution and Meeting and the participation of both Council and ordinary members therein constitute contempt of Court and/or sedition.

This application was initially fixed by the registry to be heard on 10 August 2000. Since the plaintiff's solicitor had written in for a postponement on the basis that on that date he was before another judge in Ipoh on a continued hearing, I directed both parties to appear before me on 9 August 2000. Both parties were represented on 9 August 2000 when I fixed the hearing of encl 61 to 5 September 2000.

Findings of the court

The plaintiff in his affidavit in support stated that all relevant and material facts pertaining to the issues were not in dispute and were as stated in the pleadings and the affidavits filed in respect of the interim injunction. It is not in dispute that the plaintiff is a member of the Malaysian Bar as of 4 November 1995 and that he has been paying his mandatory subscriptions, that he had received the notice dated 12 October 1999 from the first defendant informing him of the EGM to be held on 20 November 1999, that there was no requisition from the members for the said EGM, that on 2 November 1999 the plaintiff wrote to the 1st defendant asking that the EGM be called off and giving the first defendant 72 hours to comply, that the cost of holding of the proposed EGM would cost approximately RM75,000 which would have to be paid from the funds belonging to the Malaysian Bar.

In his reply Mr Roy Rajasingam who affirmed an affidavit in reply on behalf of all three defendants averred that, since the plaintiff's action against the defendants is premised on three different causes of action, that is, that the resolution and the proposed EGM are: (a) ultra vires the LPA; and/or (b) constitute contempt of court; and/or (c) constitute offences under the Sedition Act 1948 and since the plaintiff's application (encl 61) is only to try one of the three different causes of action, unless the plaintiff was prepared to abandon the other two causes of action, the plaintiff could not contend that the determination of the proposed issue would dispose of the plaintiff's case without the necessity of a trial. He also contended that

whether the matter is ultra vires or not is a matter of evidence which ought to be determined at the full trial of this action and also for the court to know the reasons behind the resolution of the EGM. There were only two affidavits, one for and one against this application.

Before I commenced hearing encl 61 parties had by consent agreed to a set of facts to be used for the hearing and determination of this application. I then marked the set of facts entitled 'Agreed Facts for O 33 Application' as 'B'. In 'B', the parties had by consent agreed to delete para 10 which referred to the plaintiff being notified by a member of the Bar Council that the proposed resolution was partly because of the allegations made in an affidavit filed in a civil suit referred to as the *Raphael Pura*'s case.

Having agreed to a set of facts to be used for the determination of encl 61, I was taken aback by Mr Robert Lazar's opening statement whereby he signalled his clients' objection 'to this mode of trial'. I would have thought and indeed the correct approach would have been to apply to strike out encl 61. Further, by agreeing to a set of facts to be used for the purposes of this application, it is my judgment that the defendants' conduct was nothing more than an act of approbation and reprobation. Neither was 'B' agreed to be used for the hearing of this application without prejudice to the defendants' right to object 'to this mode of trial'. Surely the defendants cannot blow hot and cold. They must take a stand. The purpose of filing an application to strike out a particular application or writ is to my mind to indicate to the court that from the outset the party applying to strike out, holds the view that either that mode or procedure is wrong or that factually or based on legal principles, such an application or writ ought to be struck out.

Looking into the application itself, I find that all the facts necessary are in 'B' and that there are only two agreed documents, namely:

(a) notice of the EGM dated 12 October 1999; and

(b) letter sent by the plaintiff to the Bar dated 2 November 1999.

(See the reported judgment [2000] 1 MLJ 1 at pp 7–10 where the said notice and the letter have been reproduced in full.)

Having considered the only affidavit of the defendants affirmed by Mr Roy Rajasingam it is only too plain that the defendants have failed to see the difference between the cause of action and the grounds on which the cause of action is to be founded. It is obvious that the cause of action is that the notice of the EGM with the resolution and the proposed meeting, are all ultra vires the powers and objects of the Malaysian Bar under the LPA. Having stated this as the cause of action, the plaintiff argues that it is ultra vires because it is:

(a) contemptuous;

(b) seditious;

(c) uncomtitutional.

In his submission, Mr Robert Lazar stated that he did not wish to submit on the mala fides issue. However, he urged this court to reject this application because to decide on the issues of contempt and sedition would require proof of intention and therefore oral evidence would have to be adduced as the defendants must be given the opportunity to explain why they had decided to convene the EGM.

From their submission I gather that the defendants contend that their reasons for the resolution and the EGM are matters of evidence to be adduced at the trial. This is precisely what is basically wrong with the defendants' case. Whilst I had already held, in deciding the earlier matter that there is a possibility of the defendants being guilty of contempt and sedition and that the holding of the meeting and the resolution are both ultra vires the LPA, for the purposes of deciding the interim injunction issue, I would have thought that the defendants would have realised that it is a requirement of the law to satisfy me in their affidavit itself, with evidence, instead of saying that they would adduce such evidence at trial. This is more so when the plaintiff had put in this application for leave to decide the issue on affidavit evidence. In any case, in spite of the defendants' obvious error in judgment, this court indeed gave the defendants a second bite at the cherry, in that I had ruled that if parties see the need to, they can adduce oral evidence. It was solely on this score that I made that order. I therefore cannot accept the defendants' complaint that making this order would deprive them of the right to adduce oral evidence. As for mala fides the plaintiff was perfectly entitled to argue that the very fact the defendants were going against the LPA, in spite of the plaintiff's letter urging them not to do so, was sufficient for the plaintiff to argue that there was mala fides on the part of the defendants.

I am of the view that the plaintiff was perfectly right to move this court under O 33 r 2 of the RHC. The issues and the grounds to back up the application are matters of law and if the defendants contend that they need to call witnesses, I had made an order allowing them to do so. After all since notice to cross-examine on the affidavit can be served to allow for oral evidence to be admitted, I did not see anything wrong in allowing the defendants the right to call any witness in support, instead of filing an affidavit. In *Chan Kum Loong v Hii Sui Eng* [1980] 1 MLJ 313, the then Federal Court said at p 314 in respect of trial of preliminary issues as follows:

> We think it should be said with some emphasis that counsel owe a plain duty to the court for it to function expeditiously, economically and satisfactorily. They must therefore so conduct their case as to enable the court to come to a quick and early decision. The court must also be chary of short-cuts and not be tempted to undertake any course except the one for a proper, expeditious and economical trial on the issues raised in the action.

It is important to note that O 33 r 2 of the RHC must be read with r 5 which reads as follows:

> 5 If it appears to the court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter

substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

Therefore where the court is of the view that the issues could be decided without the need for a prolonged trial, the court ought to move under O 33 r 2 of the RHC to be read with r 5. In respect of the defendants' submission, I hold that where contempt and sedition are concerned, intention or motive is irrelevant and immaterial. Therefore, the defendants' argument that evidence must be led to show intention and the motive for calling the EGM and moving the resolution, is no longer meritorious.

Before I could make a decision counsel for the second defendant then suggested that the proposed question should be as follows:

> That whether the said EGM and the said proposed Resolution constitute contempt of Court and whether the said EGM and the said proposed Resolution constitute offences under the Sedition Act 1948 and if the answers to the said two questions are yes then whether the said EGM and the said proposed Resolution are ultra vires the LPA 1976?

I took this to mean that the second defendant at least was conceding to the approach taken by the plaintiff in proceeding under O 33 r 2 of the RHC, except that he wished the question to be rephrased as suggested by the second defendant. It was indeed a surprise when I received notification of the appeal.

In any case, I was completely satisfied that this case should proceed under O 33 r 2 of the RHC read together with r 5. I therefore rephrased the question to read as follows:

> Whether the proposed Resolution dated 12 October 1999 as contained in the Notice dated 12 October 1999 and the proposed Extraordinary General Meeting of the Malaysian Bar on 20 November 1999 were ultra vires the powers and objects of the Malaysian Bar under the Legal Profession Act 1976 in that:
>
> (a) The Resolution and Extraordinary General Meeting are not within the powers and/or objects of the Malaysian Bar under the Legal Profession Act 1976;
>
> (b) The Resolution and the Meeting and the participation of both Council and ordinary members therein constitute contempt of Court and/or are seditious and/or are unconstitutional.

I also ordered that parties, if they wished, be permitted to adduce oral evidence; otherwise the case to proceed based on the pleadings, the affidavits filed, and the agreed statement of facts ('B').

I was also of the view that this was a proper case to order costs in the cause.

The defendants then applied for a stay of proceedings until after the Court of Appeal delivered its written judgment on my earlier decision which it had orally dismissed with costs. I refused the stay on the basis that since my earlier decision was on an interim injunction, I was at liberty to change my views at the trial if the defendants were able to persuade me to do so.

Incidentally the day before I began hearing the case under O 33 r 2 of the RHC read together with r 5, the Court of Appeal delivered its written judgment.

Order accordingly.

Reported by Jafisah Jaafar